Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

ROBERT FITZPATRICK,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IF SERIOUS PUBLIC CORRUPTION IS AN UNACCEPTABLE DISESTABLISHMENT OF THE RULE OF LAW, THEN IS IT A PRIMARY DUTY OF THE COURTS TO ASSIST MILITANTLY IN THE POLICING OF SAME?

II. IF SO, WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ABNEGATED ITS PRIMARY DUTY IN NOT ADOPTING PETITIONER'S ARGUMENT THAT:

> WHEN CREDIBLE *PRIMA FACIE* EVIDENCE OF SERIOUS PUBLIC CORRUPTION IS PRESENTED TO A FEDERAL TRIBUNAL, ANY AMBIGUITY WITH RESPECT TO THE JUSTICIABILITY OF THE MATTER SHOULD BE RESOLVED, AND ALL REASONABLE INFERENCES DRAWN, IN FAVOR OF EDUCING SAID EVIDENCE.

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OPINION BELOW

The matter first came to the U.S. Court of Appeals for the Federal Circuit in 2000 on an appeal of a Merit Systems Protection Board (MSPB) decision upholding the Interim Decision of an Administrative Judge ("AJ") that Fitzpatrick's Petition for Enforcement of a 1986 Settlement Agreement was not timely filed.

The Court reversed and remanded with instructions to "address whether the settlement agreement was or is being violated and, if so, what remedy may be appropriate." (A. 6a, - unpublished decision available at 2001 WL 1313663 (Fed.Cir.)

Without hearing, the AJ ruled that there was no breach of the Settlement Agreement and, if there was, it was not material. (Initial Decision, A. 11a-28a.) The MSPB affirmed. (A. 29a.)

The Court of Appeals heard the case upon oral argument in Los Angeles and affirmed the MSPB by entry of Judgment without opinion. (A. 7a.) Accordingly, the basic argument in this Petition has not been addressed.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the U.S. Court of Appeals for the Federal Circuit was entered December 16, 2004.

STATEMENT OF THE CASE

This matter manifests itself before the court as a contract case. The specific issues are whether a certain 1986 Settlement Agreement of a Merit Systems Protection Board (MSPB) matter was breached by the agency (the FBI) and, if so, whether the breach was material.

The background and facts of the underlying matter, as alleged by Fitzpatrick in his factually undisputed brief are at A. 21a-25a; and Fitzpatrick's polygraphically supported Verified Offer of Proof is at A. 39a-54a. They can be summarized briefly as follows:

> Fitzpatrick was a 21-year veteran of the FBI who in 1985 had risen to the rank of GM-15 and the position of Assistant Special Agent in Charge ("ASAC") of the Boston bureau. In 1985, he received credible information that his superior, the Special Agent in Charge ("SAC") of the Boston bureau had leaked grand jury information to a criminal defense lawyer regarding the identity of an informant. Said informant had subsequently disappeared [and is now known to have been murdered].
>
> After receiving this information concerning the SAC, Fitzpatrick contacted the office of the Director of the FBI orally and in writing to report same. Fitzpatrick was never subsequently contacted by the FBI Office of Professional Responsibility or anyone from

the Director's office regarding the leaked information he transmitted.

Subsequent to Fitzpatrick's notification of the reported leak, the SAC in question filed a complaint against Fitzpatrick regarding Fitzpatrick's investigation of an incident on Cape Cod where an agent had fired his gun during a drug apprehension. Besides disputing the substantive allegations, Fitzpatrick maintains that the SAC had ordered Fitzpatrick to conduct an investigation in violation of FBI rules and regulations; the charges complained of were rarely invoked; and but for Fitzpatrick's reporting of the SAC, the complaint would not have been filed. (See Verified Offer of Proof, ¶'s 7a-c, A. 41a.)

As a result of the SAC's complaint, Fitzpatrick was removed as ASAC and demoted two full grades. The SAC in question subsequently told Fitzpatrick that the complaint the SAC had filed against him could be mitigated if Fitzpatrick dropped the complaint against the SAC. (Polygraph Report, A. 52a-53a.) Fitzpatrick refused to alter his position and appealed to the MSPB.

In difficult circumstances for Fitzpatrick, the case was settled pursuant to a written settlement agreement, accurately quoted in the AJ's decision at A. 13a-15a. Notably, there were both non-disclosure and a personnel-file purging clauses ("2" and "9"). The reduction in grade was retained, and the

agreement also called for Fitzpatrick's transfer to the Providence, RI, office in September, 1986. He was guaranteed that he would not be transferred before eligibility for early retirement, about 3½ years later. However, in December, 1986, he resigned, partly because of, *inter alia*, "circumstances caused by the Boston SAC's retaliation," (Verified Offer of Proof, ¶ 12, A.41a) as well as corruption in the Providence office (as noted in the AJ's decision at A. 26a-28a).

After his separation from the FBI, Fitzpatrick became a licensed private investigator, often working for defense counsel at the federal bar. The filing of the MSPB case at bar was precipitated by information received by Fitzpatrick in 1997, over a decade later, that the prosecution was threatening to impeach him with information from his Official Personnel File ("OPF") in a U.S. District Court criminal sentencing proceeding in Boston in which Fitzpatrick was to testify for the defense. Further investigation by Fitzpatrick led him to believe that his OPF still contained information forbidden by the MSPB settlement agreement. He filed a complaint with the Justice Department Office of Professional Responsibility and attempted to clarify the facts by communication with the Director of the FBI. When this failed, he filed a pro se pleading with the MSPB, which was later taken over by this counsel.

The AJ ruled that Fitzpatrick's MSPB petition was untimely and the Board affirmed. On remand, after reversal by the Court of Appeals, the AJ, without hearing, ruled that: (1) there was no breach of the agreement (despite an agency admission that there were documents "in need of purging" in his OPF and the fact that the FBI's admitted post-filing manipulation of the file so as to make it impossible to determine what materials had not been purged; and (2) that even if there were a breach, it was not material because any purging was not intended to protect Fitzpatrick's future employment prospects. The Board affirmed.

Fitzpatrick appealed once again to the Court of Appeals, arguing that: (1) there was clear *prima facie* evidence of breach, which shifted the burden of proof; (2) because the actions of the agency in any event deprived him of the opportunity to prove the breach, it should be estopped from asserting there was one; (3) the breach was material if for no other reason than the purging provision was the *only valid consideration* he received under the agreement; and (4) that the Court should in any event take advantage of the opportunity to enunciate the "corruption case" rule this Petition advocates. (Summary of Argument of Brief, A. 37a-38a). Without decision, the Court of Appeals affirmed the Board.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Case is an Excellent Vehicle for Taking a Moderate Yet Powerful Step to Combat Corruption.

If the court agrees that corruption is the disestablishment of the rule of law and highly corrosive to democracy, then it follows that the courts should take every reasonable opportunity to help combat it. The Supreme Court is best situated to do so.

It is respectfully suggested that this case provides a very well-constituted vehicle for the formulation of a measured and moderate "sunlight" evidentiary doctrine in cases involving corruption, with appropriate safeguards that promises significant salutary effects.

B. The Suggested Public Policy Doctrine Will Help Reach Interstitial Situations Otherwise Difficult To Police or Even Know About.

More than merely being in accord with the public policy favoring so-called "whistle blowing," the doctrine will also smooth practical court room obstacles to its effectuation, as well as covering interstitial situations involving significant corruption, which somehow now fall between legal stools.

In this latter regard, for example, (but without, of course, any representations regarding the case at

bar), there is the delicate topic of whether the reach of corruption could from time to time extend to the administrative judiciary. The enormous legal deference accorded to the administrative judiciary's findings of fact and its drawing of inferences, combined with the decisive role of these findings in any legal proceeding, makes administrative adjudication a particularly vulnerable chokepoint to stifle inquiry into corruption in the agencies or elsewhere in administrative branch. Certainly, fears of this happening cannot be deemed totally fanciful when police/intelligence agencies come under scrutiny for corruption. This matter presents the Court with a singular opportunity to provide responsibly structured insurance against such discomforting possibilities.

C. The Court Should Encourage Actors in the "Marketplace" of Corruption Fighting.

Finally, to the extent morale is important, there is the issue of providing some encouragement to members of the bar and other individual actors who commit against corruption. The endeavor is hardly a high-profit item. A concrete sign that the high court views the duty to combat corruption as a significant enough priority to address would be salutary in this regard, particularly if the Court makes the process simpler.

D. Applying the Rule to the Instant Matter Demonstrates Its Simplicity and Efficacy.

The manner in which the proposed rule would be applied in corruption cases is straightforwardly illustrated by the contrast between the administrative judge's rulings on the two contract issues — breach and materiality — as opposed to the result which would ensue under the proposed corruption-case rule.

Existence of Breach: Fitzpatrick's assertion of breach of the settlement agreement's purging provision relied mainly upon a footnote in the agency's September 23, 1999 brief which stated:

> In a review of appellant's O[fficial] P[ersonnel F[ile], and several documents from the MSPB hearing in 1986 had been misfiled in the record and in need of removal. The record is currently under review for purging of those materials.

(A. 55a, fn.1).

The AJ admitted that such documents "could have violated the agreement." (Interim Decision, A.22a.) However, "despite steps taken to identify the documents, the agency was unable to obtain copies of them." (A. 22a.) In other words, it was impossible to determine what documents "in need of removal" the agency itself purged from the files after Fitzpatrick's petition was filed.